

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition for Expedited Rulemaking
to Establish Reporting Requirements
and Performance and Technical Standards
for Operations Support Systems

DA No. 97-1211
RM 9101

**REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE,
PACIFIC BELL AND NEVADA BELL**

Southwestern Bell Telephone, Pacific Bell and Nevada Bell hereby reply to the
comments filed in the above-captioned proceeding.

I. STATES HAVE THE EXCLUSIVE JURISDICTION TO ENFORCE OSS ACCESS
UNDER IMPLEMENTATION SCHEDULES.

The Eighth Circuit's decision in the interconnection appeal precludes the Commission from asserting jurisdiction over the implementation of OSS access. The court found that the plain language of subsections 252(c) and (d) require state commissions, not the FCC, to establish any rates for interconnection, services, or network elements.¹ Just as these statutory provisions "undeniably authorize the state commissions to determine the prices an incumbent LEC may charge," subsection

¹ *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir., July 18, 1997), slip op., p. 102 (emphasis in original).

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252(c) provides that state commissions “shall ... provide a schedule for implementation of the terms and conditions by the parties to the agreement.”² The court rejected contentions that the Commission’s general rulemaking authority, whether derived from its power over interstate or foreign communications services under subsection 201(b), or its ancillary authority under subsections 154(i) or 303(r), changed the effect of this plain language.³ The court made clear that “the FCC’s authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in [section 251] where Congress expressly called for the FCC’s participation.”⁴

Therefore, unless a state fails to act,⁵ the Commission may neither enforce the implementation of an agreement, nor rewrite the terms of the agreement (including implementation) to its liking. The court underscored repeatedly that “exclusive references to ... state commission determinations”⁶ exclude any involvement by the FCC. Thus, the Commission may not promulgate standards governing state commission determinations of exemptions and modifications;⁷ its authority under section 208 “does not enable [it] to review state commission determinations or to enforce the terms of interconnection agreements under the Act;”⁸ and it may not preempt any regulation, order, or policy of a state commission that conflicts with one of its own regulations promulgated pursuant to section 251.⁹ The FCC may hold that OSS is an unbundled network element, but it simply lacks the

² 47 U.S.C. Section 252(c)(3).

³ See *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir., July 18, 1997), slip op., pp. 102-03.

⁴ *Id.*, slip op., p. 127.

⁵ See 47 U.S.C. Section 252(e)(5).

⁶ *Iowa Utils. Bd. v. FCC*, No. 96-3321 (8th Cir., July 18, 1997), slip op., p. 118.

⁷ *Id.*, slip op., p. 119.

⁸ *Id.*, slip op., p. 121.

⁹ *Id.*, slip op., p. 126.

jurisdictional authority to enact any rules governing implementation of access, let alone interfere with the implementation schedules approved by the state commissions.

II. THE EIGHTH CIRCUIT'S DECISION ALSO FORBIDS MANDATING ABOVE-PARITY SERVICE.

While the LSPs who support the Petition talk a great deal about the need for "parity," what they advocate are performance benchmarks. Performance benchmarks are inherently discriminatory. They do not achieve parity; they guarantee a level of service to LSPs that has no relation to the level of service we provide to our retail customers. The Eighth Circuit's decision outlawed this as well. As the court said:

subsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to network elements upon demand.... subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network -- not to a yet unbuilt superior one. Additionally, the nondiscrimination requirements contained in these subsections of the Act do not justify these FCC rules. The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier. Finally, the fact that incumbent LECs may be compensated for the additional cost involved in providing superior quality interconnection and unbundled access does not alter the plain meaning of the statute, which, as we have shown, does not impose such a burden on the incumbent LECs.¹⁰

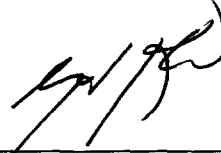
This disposes of the Petition's request for "performance benchmarks." The Commission is not authorized to adopt them. LSPs are entitled to unbundled access to our "existing network -- not to a yet unbuilt superior one."

¹⁰ *Id.*, slip op., p. 140.

III. CONCLUSION

For the reasons we state above, the Petition should be denied.

Respectfully submitted,



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Date: July 30, 1997

CERTIFICATE OF SERVICE

I, Suzan B. Ard, hereby certify that on this 30th day of July, 1997 copies of the foregoing **"REPLY COMMENTS OF SOUTHWESTERN BELL TELEPHONE, PACIFIC BELL AND NEVADA BELL"** regarding DA No. 97-1211, **RM 9101**, were served by hand or by first-class United States Mail, postage prepaid, upon the parties appearing on the attached service list.

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